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IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U. S.
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No. .....

SIDNEY STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Sidney Stein prays that a writ of certiorari issue to review the judgment (App. B, *infra*, pp. 27) of the United States Court of Appeals for the Second Circuit dated February 25, 1972, affirming the judgment of the United States District Court for the Southern District of New York convicting him of the crimes of conspiracy and manipulation. The petitioner Stein was convicted for conspiracy, 18 U. S. C. § 371, to violate the anti-manipulation provisions of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78ff(a) 78i (a)(2), and for unlawful securities manipulation.

Opinion Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 13) has not as yet been officially reported, but has

been reported at CCH Fed. Sec. L. Rep. ¶ 93,385 (2d Cir. 1972). The District Court wrote no opinion.

Jurisdiction

The jurisdiction of the Supreme Court to review the judgment herein by writ of certiorari is conferred by Sections 1 and 2 of Article III of the Constitution of the United States; 28 U. S. C. § 1254 (1); Rule 37 (c) of the Federal Rules of Criminal Procedure; and Rule 22(2) of the Rules of the Supreme Court of the United States.

Questions Presented

1. Does a post-indictment delay of five years (lacking three months) after a pre-indictment delay of approximately five years which results in the trial of a defendant for alleged criminal conduct occurring ten and eleven years before the trial constitute a violation of defendant's right to a speedy trial under the Sixth Amendment especially when government counsel admits that he has "no explanation" for the delay.

2. After finding prejudice resulting from such delay may the Court concern itself with the degree of prejudice?

3. Does a defendant who moved before three different judges in an effort to set his case for trial two or three years before the trial and moved six months before the trial to dismiss for failure to prosecute, waive his right to a speedy trial by not filing a specific demand for a speedy trial?

Constitutional Provision Involved

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

Statement of the Case

The indictment was filed on September 22, 1966 (2a).[1] The trial commenced on May 5, 1971 (94), four years and eight months later, after the denial of defendants' motion to dismiss for failure to prosecute made six months before the trial (8a), which motion was renewed at the trial and again on motion to set aside the verdict and for a new trial. The indictment originally contained 72 counts and named as defendants 12 individuals and three corporations, including the defendants Stein and Security Underwriting Consultants, Inc. (13a). By the time the case was submitted to the jury all of the counts except for eight were dismissed or withdrawn (1789). The defendant Stein was charged in each of said eight counts and the case against the defendant Security Underwriting Consultants, Inc. was submitted to the jury only on Count I.

Of the 15 defendants originally named, only four, Stein, Naphtali, Rotter and Security Underwriting Consultants, Inc. went to trial (1790). The defendants Naphtali and Rotter were acquitted (1884-1886).

Facts

During the years 1959 and 1960 Buckeye Corporation was a diversified manufacturing corporation which owned other corporations and manufactured and sold, either directly or through such other corporations, various items such as tents, hunting equipment, metal furniture, poultry hatch-

[1] References with suffix "a" refer to Volume I of the appendix in the Court of Appeals. Numbers without the letter "a" refer to Volumes II, III and IV of such appendix.

ing equipment, etc. Its president was the co-defendant George Horvath (4, 5 GX 10),[2] who pled guilty and testified for the Government. Buckeye was controlled by Horvath's family corporation, Massachusetts Mohair Plus Co., which had two wholly owned subsidiaries, Landrock Realty Corp. and Boot Mills (5, 167) Buckeye's stock was listed on the American Stock Exchange.

In 1960 Security Underwriting Consultants, Inc. was a firm owned jointly by Sidney Stein and the deceased co-defendant Leo Davis (24, 1510). They were business brokers, not stock brokers (170, 171) and through Mr. Stein and Mr. Davis, Buckeye made certain acquisitions (8, 14) among others the Montmartre Hotel in Miami (12, 20). Security Underwriting Consultants received finder's fees in connection with this acquisition.

In the course of events and as Horvath began to know Mr. Stein and Mr. Davis better he talked with them about the matter of selling shares of Buckeye stock (178, 179). This was for the most part stock owned by Massachusetts Mohair, Landrock Realty and Boot Mills and stock in the names of friends or nominees of Horvath. Mr. Stein, Mr. Davis and Security Underwriting Consultants became public relations representatives for Buckeye and were retained to promote the company, its goodwill and incidentally its stock (179, 180). Mr. Stein and Mr. Davis also undertook to sell and distribute Buckeye stock through various brokerage houses often using nominee accounts to do so.

The Government claimed that in the course of accomplishing a distribution of the Buckeye stock that Mr. Stein, Mr. Davis and Security Underwriting Consultants, Inc. manipulated the price of the stock on the American Stock Exchange (16a, 17a).

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[2] "GX" refers to Government Exhibits.

This, the Government claimed, was done by various means including setting up brokerage accounts to trade in Buckeye stock in a number of names including those of nominees, the supplying of funds or securities to some of the nominees to enable them to buy Buckeye stock and the payment or offer of payment of "secret" compensation to customers' men employed by brokers to induce them to have their customers buy Buckeye stock (16a).

In the summer of 1961 the Horvath interests decided that a substantial block of Buckeye stock owned by Massachusetts Mohair, which had changed its name to Mass. Mohair, should be sold on the over-the-counter market rather than on the American Stock Exchange (185-187). This, in substance, meant that the Buckeye stock would be sold at retail through the medium of an underwriter. It was what is generally referred to as a secondary offering. A prospectus covering the Buckeye stock which had been filed with the Securities and Exchange Commission on May 20, 1960 and up-dated by various supplements was further up-dated by a supplement dated June 27, 1961 which became Government's GX 10.

The Government offered testimony that Mass. Mohair entered into an agreement with a New Jersey firm, Continental Bond & Share Corporation owned by a man named Jerry Gale, as an underwriter to retail the stock and that when Continental Bond & Share for some reason or other could not perform, a firm known as Banner Securities, Inc. was substituted in its place. It was further claimed that the original role of Banner Securities was that of a subdealer for Continental Bond & Share. The original underwriting agreement had been lost at some time during the many years that this case was pending by either the SEC, the Attorney General of the State of New York or the United States Attorney's office and could not be produced (327, 328, 404, 1151, 1152).

One Frank Ebner, a co-defendant who had pled guilty before the trial, was the president of Banner Securities and the co-defendant Matthew Naphtali, who was acquitted by the jury, was a partner in the firm. Bernard Rotter, a co-defendant who was also acquitted, was a salesman for the firm (668).

Between July 1, 1961 and October 30, 1961 Banner Securities engaged in a telephone campaign to sell Buckeye stock. The sales effort was directed principally to people who were owners of Buckeye stock to induce them to purchase additional shares in the course of the secondary offering. Banner Securities' customers ledger pages pertaining to all sales of Buckeye stock and the "blotter", both of which were in the custody of the Government, were missing by the time of trial (745, 746).

Approximately 50,000 shares of Buckeye stock were sold to various customers of Banner Securities by salesmen employed by Banner Securities (17a, 448). It was the Government's claim that the stock sold over the counter by Banner Securities was sold at a price corresponding to the closing price on the American Stock Exchange on the day preceding the day of the sale. The essence of the manipulation charged against Mr. Stein in count 2 and Mr. Stein and the other defendants as part of the conspiracy in count 1 is that on occasions Mr. Stein placed purchase orders in certain nominee accounts to purchase Buckeye stock at or near the close of the market on the American Stock Exchange with a view to having the stock close on what the witnesses called an "up-tick" or on the offering side of the market sometimes one-eighth or one-quarter of a point above the next previous sale.

The fraud charges on each of which Mr. Stein was acquitted consisted of the alleged failure on the part of Ban-

ner Securities salesmen to inform customers that there had been secret and additional compensation paid to Banner Securities to make sales of the Buckeye stock, failure to inform customers concerning the purchases on the American Stock Exchange claimed to constitute the manipulation and failure to inform them concerning certain losses incurred by the Buckeye Corporation (1846-1847).

From the foregoing greatly condensed statement of the case it must be apparent that a defendant would have great difficulty in defending himself 10 and 11 years after the multiplicity of transactions giving rise to the charges. Especially is this so when the underwriting agreement, the customers' ledger pages of the underwriter and the books and records of those who testified against the defendant are unavailable (87a, 421, 432, 775, 1152). One of the principal witnesses against the defendant heavily relied upon by the Government testified that his recollection had "eroded" over the years (208) and another of the witnesses similarly relied upon by the Government testified that his memory was "nil" (1344), but each of them claimed to remember matters and things sufficient to permit the Government to claim from their testimony the making of a *prima facie* case of guilt as charged.

Approaching the case from the standpoint of the four factors which the court below said should be considered, the following facts are undisputed:

1. *Length of delay.* Pre-indictment delay, at least five years; post-indictment delay, five years lacking three months.

2. *Reason for delay.* When asked by the trial court concerning the reason for the long delay Government counsel stated, "I have no explanation for your Honor" (88).

3. *Prejudice.* Death of two witnesses, one of whom was a co-defendant and partner of the defendant Sidney Stein and a co-owner of defendant Security Underwriting Consultants, Inc. (181A). Loss of books and records of every investment banking house directly connected with the underwriting which gave rise to the case; (87a, 327, 328, 404, 421, 432, 1152)[3] failing and eroding memories of witnesses (208, 1344).

4. *Waiver.* Defendant's counsel appeared before three different judges in 1968 seeking to set this case for trial and after the case was finally set down for trial on January 6, 1969 appeared at the appointed hour in the designated courtroom to proceed (58a, 72a, 73a). After waiting for approximately one hour on that occasion the judge's law clerk came into the room and announced that the case had been indefinitely postponed. In the fall of 1970 defendant moved to dismiss for failure to prosecute.

Reasons for Granting the Writ

As stated by the Second Circuit in the opening sentence of its opinion (App. A, *infra*, p. 14).

> "This case raises a *serious* speedy trial question under the sixth amendment, in addition to questions regarding the statute of limitations and sufficiency of the evidence" (italics ours).

As stated, the defendant was tried for criminal conduct which is alleged to have taken place ten and eleven years before the trial. After a pre-indictment delay of approximately five years the indictment herein was returned on

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[3] See particularly 175 where the trial court in excluding certain evidence said:

> "Because there is an inference to be drawn from it which is not supported by the facts and is incapable of refutation because the *government has lost the records.* That's why." (Emphasis ours.)

September 22, 1966. The trial commenced almost five years later on May 5, 1971. The Court below stated:

> "While the delay here is long enough to meet the first requirement for dismissal, mere delay without prejudice does not establish a violation of the sixth amendment" (App. A, *infra*, p. 28).

But, the Court found prejudice resulting from missing documents and failing memories of witnesses and then proceeded to concern itself with the degree of prejudice, finally stating, "We do not think the prejudice substantial" (App. A, *infra*, p. 22). The Court below found that there were "failing memories of some witnesses" and stated that such failing memories constituted "a great problem with a trial occurring as long after the alleged criminal acts as this one" (App. A, *infra*, p. 23) but then proceeded to speculate that the defendants "were *probably* helped as much as hurt by memory lapses" (App. A, *infra*, p. 23). (Italics ours.) This is a cynical and cavalier basis for *brushing* aside the violation of a constitutional right. In speaking of a right guaranteed by the sixth amendment, this Court has said that such a right is

> "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice from its denial" *Glasser v. United States*, 315 US 60, 76 (1942).

This case raises all the questions raised in *Barker v. Wingo*, No. 71-5255, ____ U. S. ____, 30 L. Ed. 2d 729 (Jan. 17, 1972) in which case this Court recently granted certiorari. In the *Barker* case the petitioner relied on the length of delay alone. In the case at bar petitioner did not rely upon delay alone, but, established and the Court found prejudice although not the degree of prejudice it considered essential. In the *Barker* case no effort was made by the defendant to bring the case to trial. In this case we appeared

before three separate judges in 1968 and 1969 in an effort to set the case for trial. When the case was set for trial on January 6, 1969 we again appeared at the appointed time in the designated courtroom and waited with co-defendants and their counsel for approximately an hour when the judge's law clerk came among us and told us the case was indefinitely postponed. On this occasion there was no judge to whom we could complain, or stenographer with whom we could make a record.

If such a course of conduct, including as it did preparation for trial and frustrated efforts to try the case, constitutes a waiver of a right to speedy trial because we did not file a formal paper stating in substance "The defendant hereby demands a speedy trial", then we submit that the bench and bar should be so informed by a decision of this Court. As stated in *Johnson v. Zerbst*, 304 U. S. 458, 464 (1937):

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"

This Court has undertaken no extensive analysis of the scope and content of the right to a speedy trial. *Dickey v. Florida*, 398 U. S. 30, 40 (1970) (Concurring Opinion). Justice Brennan stated in his concurring opinion in *Dickey* that ". . . many—if not most—of the basic questions about the scope and context of the speedy trial guarantee remain to be resolved" (at page 56). Justice Brennan further noted (at page 57) that "the speedy-trial guarantee should receive a more hospitable interpretation than it has yet been accorded."

The present case affords this Court an opportunity to thoroughly analyze the scope of the speedy trial guarantee

as it poses important questions as to whether the four requirements mentioned by the Court below are consistent with Constitutional standards.

If a waiver of the right to a speedy trial is to be predicated on a "demand rule", when does the defendant become eligible to make the demand, in what form should he make it, and to whom should it be addressed? Counsel for the Government argued in the Court below that efforts to move the case for trial, appearances at calendar call to announce that the defendant was ready, together with readiness to proceed on a date which had been fixed for trial were unavailing unless the defendant filed what he called a formal demand for trial. The Court below seems to have so decided. In *Dickey v. Florida*, 398 U. S. 30, 49 (1970) Justice Brennan stated in a concurring opinion that

> "the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake."

That the burden of prosecution should rest with the prosecutor rather than with the defendant was made emphatically clear in *United States v. Dillon*, 183 F. Supp. 541 (SDNY 1960) where the Court stated at 543:

> "It is the duty of the public prosecutor, not only to prosecute those charged with the crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to a speedy trial."

The American Bar Association has disapproved of the inflexible doctrine of waiver in the Project on Minimum Standards for Criminal Justice:

> "[T]he demand requirement is inconsistent with the public interest in prompt disposition of criminal cases . . . [T]he trial of a criminal case should not be unreasonably delayed merely because the defend-

ant does not think that it is in his best interest to seek prompt disposition of the charge." *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial,* Section 2.2 at 17.

Finally, since the petitioner was prejudiced by the delay and the Court of Appeals so found at least to some extent (App. A, *infra,* p. 23), this case raises all the questions discussed by Mr. Justice Brennan in his concurring opinion in *Dickey v. Florida* with respect to the role of prejudice in speedy-trial determinations. 398 U. S. 30 at 52 through 56. Such questions will continue to trouble trial courts, prosecutors and defendants until guided by an authoritive ruling by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted, the judgment below reversed and the indictment dismissed.

Respectfully submitted,

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Dated: March 24, 1972.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 490, 491—September Term, 1971.
(Argued February 3, 1972 Decided February 25, 1972.)
Docket Nos. 71-1960, 71-2004

UNITED STATES OF AMERICA,

Appellee,

v.

SIDNEY STEIN and SECURITY UNDERWRITING CONSULTANTS, INC.,

Defendants-Appellants.

Before:

Anderson and Oakes, *Circuit Judges,* and Claire,* *District Judge.*

Appeals from judgments of conviction, entered in the United States District Court for the Southern District of New York, after trial before Frederick van Pelt Bryan, *Judge,* and a jury. Appellant Stein appeals from convictions for conspiracy, 18 U. S. C. § 371, to violate the anti-manipulation provisions of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78(ff), 78i(a)(2), and for unlawful se-

* United States District Judge for the District of Connecticut, sitting by designation.

curities manipulation. Appellant Security Underwriting Consultants, Inc., appeals from a conviction for conspiracy.

Affirmed.

Frank G. Raichle, Buffalo, New York (Raichle, Banning, Weiss & Halpern, Buffalo, New York, on the brief), *for Appellant.*

Daniel J. Sullivan, Assistant United States Attorney, New York, New York (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Peter F. Rient, Assistant United States Attorney, on the brief), *for Appellee.*

OAKES, Circuit Judge:

This case raises a serious speedy trial question under the sixth amendment, in addition to questions regarding the statute of limitations and sufficiency of the evidence. Appellants Sidney Stein and Security Underwriting Consultants, Inc. (Security), of which Stein was half owner, were convicted of conspiracy in violation of 18 U. S. C. § 371; Stein was also convicted of manipulating the price of Buckeye Corporation stock, a security registered on the American Stock Exchange (Amex), contrary to 15 U. S. C. §§ 78ff(a), 78i(a)(2). Stein was fined $10,000 and sentenced to two years' imprisonment on the conspiracy count and was fined $10,000 and put on five years' unsupervised probation on the substantive count. Security, now a defunct corporation, was fined $1,000 on the conspiracy count.

The indictment originally contained 72 counts against 15 defendants, but as submitted to the jury it charged only four defendants in eight counts, on six of which (charging fraudulent sales of Buckeye stock to the public) Stein was acquitted. Two co-defendants were acquitted on all counts.

Trial commenced on May 5, 1971, under an indictment filed September 22, 1966, covering alleged criminal conduct engaged in from the spring of 1960 to the autumn of 1961. On October 31, 1961, trading in Buckeye stock was suspended.

Through the testimony of five co-defendants, twelve brokers and other witnesses and almost 2,000 documentary exhibits the government's proof was that Stein and his partner in Security, Leo Davis, who died three days after the trial commenced, through Security brought about a sale of some 603,000 shares of Buckeye stock while Buckeye was sustaining a $4 million operating loss. This was accomplished by artificially shoring up the price of the stock through purchases of small amounts on the exchange through different brokers and in different names, and by offering to brokers secret compensation to induce them to promote sales of Buckeye. A recital of the facts is necessary for an understanding of the arguments regarding delay and prejudice.

In the spring of 1960, Buckeye was controlled by one George Horvath and his family through Massachusetts Mohair Plush Corporation ("Massmo") and two of its wholly-owned subsidiaries. Buckeye was what might be caled a baby conglomerate, involved in the manufacture and sale of camping equipment and chicken incubators, the operation of a series of canals and locks, and an acquisition program although heavily in debt to Massmo and others. Stein and Davis helped Buckeye acquire a leasehold interest in the Montamare Hotel in Miami Beach, and Horvath agreed to treat Stein and Davis as preferred finders in connection with Buckeye's acquisitions if they would promote the sale of Buckeye stock. As a part of the scheme, according to Horvath, he was to furnish Stein with expense

money to entertain and buy presents for brokers, and to provide vacation trips and throw parties for them, with attractive girls and liquor, as part of his operating expense.

In the summer and fall of 1960, Stein and Davis sold to the public 154,500 shares of Buckeye on behalf of two Massmo subsidiaries and Horvath's brother-in-law and 64,710 shares newly issued by Buckeye. During this same period they bought small amounts—usually 100 share lots—in the names of various nominees, 90 per cent of which were made at a slight increase in price—that is on the "plus tick"—from the previous trade of the day. This small lot buying raised the price quoted in the newspapers the following day. Orders were placed with different brokers to avoid suspicion. Stein also used his expense money to throw parties for brokers and to offer them secret compensation to induce their customers to buy Buckeye. Through these efforts the price of Buckeye was maintained at between 3 and 4 while the 219,000-plus shares were unloaded to the general public. For Stein's and Davis' efforts they received 15,000 shares of Buckeye stock as finder's fees on two acquisitions and other consideration, including the loan of $160,000 from Buckeye.

In the winter and spring of 1961, while Stein and Davis concentrated their promotional activity on the west coast, entertaining and compensating brokers through one James Cravitz, a Los Angeles lawyer who died two years later. Stein also offered Frank Ebner of Banner Securities, a New York brokerage firm, 25 cents a share to sell Buckeye stock to his customers. During that spring the partners were successful in selling 330,400 Buckeye shares for Massmo as well as 27,584 shares on Security Underwriting's account and 3,800 shares previously bought by a

nominee. The efforts were too successful, however, for at about the same time Massmo agreed to exchange $3.37 million owed to it by Buckeye for 1,392,552 shares of Buckeye stock at $2.25 per share; the artificial market price created by Stein and Davis embarrassed the Buckeye management since the market price was 3⅝, and stockholder approval of the issue was needed. Stein, obligingly, promptly dumped enough stock on the market to drop the price to 3¼, at which point the Buckeye stockholders approved the exchange.

Buckeye, however, sustained a $3.8 million loss for the fiscal year ended April 30, 1961. Stein then asked Ebner of Banner Securities for help in selling Buckeye stock over-the-counter at prices determined by the Amex price, for which Ebner received a commission seven per cent higher than that disclosed in the prospectus (which also failed to disclose Buckeye's extensive operating losses). Banner was also paid 25 cents per share for each share it bought for Stein and Davis on the Amex and then resold. Meanwhile, on trades often made at the end of the day Stein and Davis were buying Buckeye on the exchange, still in nominees' names, in 100 or 200 share lots. From July through October 1961, purchases in accounts controlled by Stein, Davis and Horvath amounted to 72,600 shares, or 28.8 per cent of the daily exchange volume of Buckeye purchases. When trading was suspended by Amex authorities on October 31, 1961, the Buckeye price fell precipitously to 50 cents per share. By then Massmo had advanced to Stein, Davis and Security $293,000 in unsecured loans. After suspension, the SEC began an investigation. One Hadfield, a customer's man in a brokerage house named as a co-defendant, testified at trial that Stein told him to conceal from the SEC Stein's orders in a nominee's name

and, shortly after the indictment, told Hadfield and another broker that the case was a "witch hunt" and "would probably never go to trial," and that they should stick to their stories.

Appellants' principal claims of prejudice are based upon: (1) the deaths of Cravitz and Davis; (2) the loss of certain books and records; (3) the inability of a government witness to testify as to Amex rules and regulations in effect in 1960 and 1961; and (4) the fading memories of Horvath, who pleaded guilty and testified for the government, a government witness (Eugene Ross), who the defense contended took Stein's place before the statute of limitations began to run, and others (Lowenthal, a Miami broker, Ebner, the Banner chief), including Stein himself.

At the outset we note that appellants made no demand for trial until October 29, 1970, after a May 1971 date had been set, although they had been ready for trial in January 1969 before Judge MacMahon, who subsequently excused himself from the case.

At first blush, the lapse of time here involved—almost ten years from the last transactions complained of to the trial—might seem enough to constitute a denial of the sixth amendment guaranty of the right to a speedy and public trial.[1] The right to a speedy trial ". . . is as fundamental as any of the rights secured by the Sixth Amendment" and ". . . has its roots at the very foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U. S. 213, 223 (1967) (speedy trial right violated by indeterminate

[1] Appellants argue that the district court, in its discretion, should have dismissed the indictment under Fed. R. Crim. P. 48(b), for "unnecessary delay" in presenting the charge to a grand jury and in bringing them to trial, but they do not argue violation of the due process clause of the fifth amendment.

threat of prosecution after *nolle prosequi*). *See also Dickey v. Florida*, 398 U. S. 30, 37-38 (1970) (right violated by almost eight-year delay, with repeated demands by defendant for trial, death of two witnesses, unavailability of a third, loss of police records and "no valid reason" for delay); *Smith v. Hooey*, 393 U. S. 374 (1969) (right applicable after demand by person already in jail on another charge).

At the same time the right is "necessarily relative," and we must look to the circumstances of each case, *Beavers v. Haubert*, 198 U. S. 77, 87 (1905), at least where the delay is not ". . . purposeful or oppressive." *Pollard v. United States*, 352 U. S. 354, 361 (1957). The ". . . essential ingredient [in the administration of justice] is orderly expedition and not mere speed." *Smith v. United States*, 360 U. S. 1, 10 (1959). *See generally United States v. Ewell*, 383 U. S. 116, 120-21 (1966).

This court[2] is not alone in concluding that the right is a relative one. *Compare United States v. Borman*, 437 F. 2d 44, 46 (2d Cir.), *cert. denied*, 402 U. S. 913 (1971), *with Evans v. United States*, 397 F. 2d 675, 676 (D. C. Cir. 1968), *cert. denied*, 394 U. S. 907 (1969). Speedy trial questions must be analyzed by examining four factors: (1) length of the delay; (2) reason for the delay; (3) prejudice to the defendant; and (4) waiver by the defendant. *United States ex rel. Solomon v. Mancusi*, 412 F. 2d 88, 90 (2d Cir.), *cert. denied*, 396 U. S. 936 (1969), *followed in, e. g., United States v. Fitzpatrick*, 437 F. 2d 19, 26-27 (2d Cir. 1970).

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[2] The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases were not in effect until June 5, 1971, after the time of the trial herein. Generally speaking they would require trial within six months except when "exceptional circumstances" are shown. Rule 5(c)(ii), (h).

While the delay here is long enough to meet the first requirement for dismissal, mere delay without prejudice does not establish a violation of the sixth amendment. *United States ex rel. Solomon v. Mancusi, supra* at 90-91. There is no claim that the delay here was purposeful on the government's part. *See United States v. Dooling*, 406 F. 2d 192, 196 (2d Cir.), *cert. denied*, 395 U. S. 911 (1969). To the contrary, the very nature of this case—involving a complex course of conduct with hundreds or thousands of transactions in several states over a long period of time, with many witnesses and much documentary proof—furnishes some good reason for the delay. As in *United States v. Orsinger*, 428 F. 2d 1105, 1114-15 (D. C. Cir.), *cert. denied*, 400 U. S. 831 (1970, where some five years elapsed between the date of the offenses and the indictment, the prosecution here ". . . resulted from an extended [also an SEC] investigation into the complicated and tangled affairs of the appellant and his corporation." Again, "[t]ime is needed for investigation and determination of the need for and extent of criminal charges to be brought, particularly in wide-ranging securities distribution schemes." *United States v. Parrott*, 425 F. 2d 972, 975 (2d Cir.), *cert. denied*, 400 U. S. 824 (1970). To the extent that delay occurred after indictment, moreover, it was at a time in which the case take-in in the Southern District of New York was rapidly increasing without a full quota of judges appointed or available. *See United States v. Fitzpatrick, supra* at 27 (similar circumstances in Eastern District of New York).

To the extent that the delay here was between the time of the offense and the indictment, only recently the Supreme Court held that, absent a showing of prejudice or purposeful delay, there is no violation of the sixth amendment or

the due process clause so long as there is compliance with the applicable statute of limitations. *United States v. Marion*, 40 U. S. L. W. 4092 (U. S. Dec. 20, 1971).

We turn to appellants' specific claims of prejudice. Two of Stein's co-conspirators died, Cravitz while the SEC investigation was still in progress and Davis shortly after trial began. Davis, appellants claim, would have been available as a "source of information" in connection with the payment to Banner of secret compensation in the form of stock in American States Oil Company. If, as they claim, appellants were surprised that the government relied upon Ebner's testimony implicating Stein and Davis in the payment to Banner, they should have sought a bill of particulars, for Ebner was a named defendant. Moreover, there was testimony from one Sellich that Stein was present when Davis paid Sellich $300 for acting as a mail drop in a payment to Banner, and there was proof that he also acted as a mail drop for "Harold" and "Lawrence Rosenbloom," names in which stock destined for Banner's account was registered. Even without this American States Oil stock transaction there was ample evidence from five former brokers—Ebner, Sacks, Shanman, Rapp and Maher —who testified that Stein offered them cash compensation for Buckeye stock bought by their customers. Two Californians from large brokerage concerns, Ross and Leigh, also testified to receipt of secret payments for selling Buckeye stock, one testifying that he was mailed cash by Stein directly. In the light of this evidence, we fail to see how Davis' death prejudiced appellants.

As for Cravitz, he died shortly after the events complained of and long before any realistic trial date, so no prejudice occurred from his decease. *United States v. Parrott*, *supra* at 976; *see United States v. Alo*, 439 F. 2d 751, 754-56 (2d Cir.), *cert. denied*, 404 U. S. 850 (1971).

A number of documents were not available as a result of the lapse of time. However, how the Security Underwriting books and records could have assisted the defense is not clear, since loans to Security from Massmo were shown by Massmo's books, and copies of agreements between Security and Buckeye as to Buckeye stock were supplied in Government's Exhibits 56 and 57. In any case, the Security books were lost in 1963 or 1964, before indictment. *Cf. United States v. Parrott*, *supra* at 976.

The absence of the original underwriting agreement under which Banner sold Buckeye stock is said to have been prejudicial, but there was a copy of the agreement between Massmo and Continental Bond & Share Corporation, Banner's predecessor or superior. Moreover, it was secret compensation to Banner, not the compensation under the agreement, which was in issue. Missing customer ledger sheets and two blotter pages from Banner were in fact reconstructed from the rest of Banner's blotter and stock record by Banner's cashier, who also traced the American States Oil stock proceeds, so that the loss of this documentary material had no real effect (although there was some confusion as to what happened to those proceeds).

It is claimed that the witness Shanman, of the now defunct brokerage firm of Neil James & Co., could not in the absence of his books—which he hadn't seen since 1961—be cross examined on his testimony about buying Buckeye late in the day so as to show an uptick. However, Government Exhibit 1726—devised from the records of the brokerage houses through which Neil James & Co. and others cleared their transactions—was available to show all end-of-day Buckeye stock transactions conducted by Neil James. We do not think the prejudice substantial.

Finally, appellant argues that Amex rules and regulations in 1960 and 1961 were not available at the time of trial, but there is no showing that this was in fact the case. A government witness who was directed to look them up didn't return to the court, but appellants made no effort to produce the rules, and they do not suggest that these would in any way have been helpful to them.

There were failing memories of some witnesses, a great problem with a trial occurring as long after the alleged criminal acts as this one. Recollection does, as one witness put it, "erode" after such a lapse of time, and examination on small points is made more difficult. Witnesses' testimony after such a lapse of time may have become "canned," *i. e.*, based upon what they said in a statement, not upon what actually occurred. A reading of the record, however, convinces us that appellants were probably helped as much as hurt by any memory lapses. *See United States v. Feinberg*, 383 F. 2d 60, 66 (2d Cir. 1967), *cert. denied*, 389 U. S. 1044 (1968); *cf. United States v. Alo*, *supra* at 755. *See also United States v. Smalls*, 438 F. 2d 711, 713 (2d Cir.), *cert. denied*, 403 U. S. 933 (1971) (inability of government's witnesses to recall details goes to weight of testimony).

Appellants did not demand trial until October 29, 1970, after the case was assigned to Judge Bryan and a trial date in May of 1971 set. True, they had been ready for trial in January 1969 when Judge MacMahon excused himself. But, as one witness testified, Stein had thought the case would never be tried. One can only suppose that appellants believed they would benefit from any delay at least as much as would the government.

The absence of substantial prejudice and appellants' failure to seek an early trial bar assertion of a speedy

trial claim in this instance, where there is nothing to show "purposeful or oppressive" delay on the part of the government. *Pollard v. United States, supra* at 361; *United States v. Persico,* 425 F. 2d 1375, 1385 (2d Cir.), *cert. denied,* 400 U. S. 869 (1970); *United States v. Aadal,* 407 F. 2d 381, 382 (2d Cir.) (*per curiam*), *cert. denied,* 394 U. S. 1008 (1969).

Appellants further argue that the five-year statute of limitations, 18 U. S. C. § 3282, ran before the September 22, 1966, indictment was filed. However, at the end of September 1961 one California broker paid by Stein sold Buckeye stock to his customers.[3] One broker (Ross) was contacted by Stein "about a month or so before the stock was delisted" (which was on October 31, 1961), and "[s]omewheres about, I believe, October," Ross met with Stein, Horvath, Davis and a Mr. Lepento at the Buckeye offices where he was promised expenses and $1,000 per month as compensation for "getting brokers interested in Buckeye Corporation stock." He subsequently received two sets of airplane tickets and a $1,000 check but did nothing "because a short time thereafter the stock was delisted . . . ." On October 6, 1961, one payment for Buckeye purchases was made by Massmo to Ebner and another was made on October 5, 1961, to Betta Investment Corporation, with which Cravitz was associated, both payments arranged by Stein. While the evidence of a continuing course of conduct after September 22, 1961, was slender, we hold that it was sufficient to take the case without the bar of the statute.

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[3] The government claims that "at the end of September" Stein told another broker, one Meyer, that the stock was going to move, but Meyer's testimony was "I don't know if it is exactly in September or somewhere near there. . . ."

Appellants finally argue, apparently for the first time, that there was insufficient evidence to sustain the conviction under Section 9(a)(2) of the Securities Exchange Act of 1934, 15 U. S. C. § 78i(a)(2), which makes it unlawful to use a facility of a national securities exchange:

> To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

The purpose of the statute is to prevent rigging of the market and to permit operation of the natural law of supply and demand. *Crane Co. v. Westinghouse Air Brake Co.*, 419 F. 2d 787, 792-96 (2d Cir. 1969), *cert. denied*, 400 U. S. 822 (1970). Here there was proof of "creating actual or apparent active trading in" and of "raising or depressing the price of" Buckeye Corporation stock, although proof of either would have been sufficient. 3 L. Loss, Securities Regulation 1549-55 (2d ed. 1961). The activity in Buckeye stock that the public saw was, in the Senate Report's apt imagery, "a mirage" rather than "the reflection of a genuine demand." Senate Comm. on Banking & Currency, Stock Exchange Practices, S. Rep. No. 1455, 73d Cong., 2d Sess. 54 (1934). *See, Thornton v. SEC*, 171 F. 2d 702 (2d Cir. 1948) (*per curiam*). Appellants claim that Stein was merely "pegging" or "stabilizing" the price of Buckeye stock, a practice said to be legitimate under SEC rules. 2 CCH Fed. Sec. L. Rep. ¶ 22,614. However, "stabilization" is prohibited by SEC Rule 10b-7(g) in a case such as this one, where the offering price is determined by the market price. Where stabilization is permitted there must be disclosure in the prospectus and daily reports filed under SEC Rules

10b-7(k), (*l*) and 17a-2, neither of which occurred here. 17 C. F. R. § 240.10b-7; 17 C. F. R. § 240.17a-2. This was manipulation, pure and simple, under 15 U. S. C. § 78i(a)(2). *See United States v. Re,* 336 F. 2d 306, 309-10 (2d Cir.), *cert. denied,* 379 U. S. 904 (1964); *United States v. Minuse,* 142 F. 2d 388, 389 (2d Cir.), *cert. denied,* 323 U. S. 716 (1944); *R. J. Koeppe & Co. v. SEC,* 95 F. 2d 550 (7th Cir. 1938) (paying touts to recommend security). *See also* Note, *Manipulation of the Stock Markets Under the Securities Laws,* 99 U. Pa. L. Rev. 651 (1951); Note, *Regulation of Stock Market Manipulation,* 56 Yale L. J. 509 (1947).

Judgment affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February, one thousand nine hundred and seventy-two.

Present: Hon. Robert P. Anderson,
Hon. James L. Oakes,
Circuit Judges,
Hon. T. Emmet Claire,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v

GEORGE A. HORVATH, SIDNEY STEIN, LEO DAVIS, SECURITY UNDERWRITING CONSULTANTS, INC., BERTRAM S. HADFIELD, ISTVAN HAJOU, LILA ROBERTS, STERLING LAVINE, SAMUEL BALINSKY, BERNARD ROTTER, MILTON SMITH, MATTHEW NAPHTALI, FRANK EBNER, LANDROCK REALTY CORP., MASSACHUSETTS MOHAIR BLUSH CO. INC.,

Defendants,

SIDNEY STEIN, SECURITY UNDERWRITING CONSULTANTS, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

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Supreme Court, U. S.
FILED
MAY 15 1972
MICHAEL RODAK, JR., CLERK

No. 71-1214

In the Supreme Court of the United States

OCTOBER TERM, 1971

SIDNEY STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1214

SIDNEY STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of having conspired (18 U.S.C. 371) to violate the anti-manipulation provisions of the Securities Exchange Act of 1934, and of unlawful securities manipulation (15 U.S.C. 78ff(a) and 78i(a)(2)). On September 16, 1971, he was sentenced to two years' imprisonment on the conspiracy count and placed on five years'

probation on the substantive count. He was also fined $10,000 on each count.

Petitioner's speedy trial contention is fully answered in the thorough opinion of the court of appeals. That court, in addition to finding justification for, and lack of prejudice from, the delay of which petitioner complains, also predicted its denial of the claim on the lack of a demand by petitioner or his counsel for trial. Since claims similar to those raised by petitioner are involved in *Barker* v. *Wingo*, No. 71-5255, this Term, certiorari granted January 17, 1972,[1] this Court may wish to defer consideration of this case until *Barker* is decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

[1] We have filed an *amicus curiae* brief in *Barker* v. *Wingo*.

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FILED
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1214

SIDNEY STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

FRANK G. RAICHLE,
Attorney for Petitioner,
10 Lafayette Square,
Buffalo, New York 14203.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1214

SIDNEY STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for a writ of certiorari entered on June 26, 1972; (2) granting the petition; and (3) staying the execution of the mandate pending a determination of this application.

The original petition for a writ of certiorari herein was duly filed on March 24, 1972. Such petition was denied by this Court on June 26, 1972. Petitioner submits that subsequent to the filing of his original petition for certiorari and the date hereof an intervening circumstance of substantial and controlling effect has occurred, *i. e.*, the decision of this Court on June 22, 1972 in the case of *Willie Mae Barker v. John W. Wingo*, No. 71-5255, 40 LW 4840.

The case at bar, in the words of the Second Circuit, "raises a serious speedy trial question under the sixth amendment . . ."[1]

The Court of Appeals, in affirming the trial court's refusal to dismiss the case for failure to prosecute and for violation of the petitioner's sixth amendment rights, applied the so-called "demand-waiver rule", whereas this Court in the *Barker* case rejected the demand-waiver rule because "it is insensitive to a right which we have deemed fundamental." This Court then announced that "The approach we accept is a balancing test in which the conduct of both the prosecution and the defendant are weighed" and further that the "balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." Such an approach in the case at bar will demonstrate that the petitioner Stein was tried in May of 1971 for alleged criminal conduct (Securities Act violations) engaged in in the years 1960 and 1961—ten and eleven years before the trial! When asked by the trial court concerning the reason for the long delay, Government's counsel stated, "I have no explanation for Your Honor" [88a[2]]. The Court of Appeals, *dehors* the record, observed that it has been held in some complex securities cases that time is required for investigation and preparation on the part of the Government but no one, much less the United States attorney, claimed that this was the reason for the long delay in the case at bar.

Under this Court's holding in the *Barker* case if a rehearing of our application for certiorari and a reversal is not deemed to be called for, it is plain that the case should

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[1] Appendix A, annexed to petition for certiorari, p. 14.

[2] Refers to vol. I of appendix to our brief in the Court of Appeals which appendix has been duly certified and filed in this court.

be remanded for a hearing before the trial court to develop the effect of the factors found to be pertinent in the *Barker* case, such as "length of delay"[3], "the reason for the delay"[4], "the defendant's assertion of his right"[5], and "prejudice to the defendant".

In the *Barker* case this Court referred to the fact that a defendant might be denied a speedy trial where "continuances were granted *ex parte*." In the case at bar the following occurred: Defendant's counsel appeared before three different judges in 1968 seeking to set this case for trial and after the case was finally set down for trial on January 6, 1969 appeared at the appointed hour in the designated courtroom to proceed (58a, 72a, 73a). After waiting for approximately one hour on that occasion the judge's law clerk came into the room and announced that the case had been indefinitely postponed. There was no judge present to whom objection could be addressed nor court reporter through whom a record could be made. In the fall of 1970 defendant moved to dismiss for failure to prosecute.

With respect to prejudice the record shows the following: Death of two witnesses, one of whom was a co-defendant and partner of the defendant Sidney Stein and a co-owner of defendant Security Underwriting Consultants, Inc. who died as the trial commenced (181A). Loss of books and records of every investment banking house directly connected with the underwriting which gave rise

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[3] 10 and 11 years between the commission of the alleged criminal conduct and the trial.

[4] As stated, the Government when asked was unable to assign any reason (88a).

[5] Over the years the defendant and his counsel appeared before three different judges in an effort to set the case for trial (58a, 72a, 73a).

to the case (87a, 327, 328, 404, 421, 432, 1152);[6] failing and eroding memories of witnesses (208, 1344).

Conclusion

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays this Court to grant a rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

FRANK G. RAICHLE,
Attorney for Petitioner,
10 Lafayette Square,
Buffalo, New York 14203,
Tel.: 716-852-7587.

Dated: July 5, 1972.

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[6] See particularly 775 where the trial court in excluding certain evidence said:

> "Because there is an inference to be drawn from it which is not supported by the facts and is incapable of refutation because the *government has lost the records.* That's why." (Emphasis ours.)

Certificate of Counsel

As counsel for petitioner I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the ground specified in Rule 58(2).

FRANK G. RAICHLE,
Counsel for Petitioner.